



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**SUCCESSION CAUSE NO. 1014 OF 2013**

**IN THE MATTER OF THE ESTATE OF MUTHIGANI KATHITU WARUI (DCD)**

**CHARITY WANGUI MUNENE.....APPLICANT**

**V E R S U S**

**SYMON NYAMU MUTHIGANI.....RESPONDENT**

**JUDGMENT**

This is a matter which relates to the estate of Muthigani Kathitu Warui (deceased) who died intestate on 18/10/1998. Prior to his death he was the sole registered proprietor of land parcel No. Mwerua/Kagio/18 and is the only property which formed his estate.

The Respondent, Symon Nyamu Muthigani petitioned for a grant of Letters of Administration in his capacity as the son of the deceased. A Grant of Letters of Administration to the estate of the deceased was issued to the respondent on 21/2/2006 and confirmed on 16/11/2006. Land parcel No. Mwerua/Kagio/18 devolved to the respondent.

The applicant Charity Wangui Munene has filed a summons for revocation and or annulment of the grant issued to the respondent under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. It seeks the following orders:-

- a. That the proceedings to obtain the grant were defective in substance.
- b. That the grant was obtained fraudulently by making a false statement or by concealment from the court of something material to the case.
- c. That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

**Applicant's case**

The applicant Charity Wangui Munene filed an application dated 14/11/2011 seeking that the grant issued be revoked/annulled. This was based on the ground that prior to his death, the deceased had fraudulently registered the estate land parcel No. Mwerua/Kagio/18 in his name in 1995. That the deceased had agreed to transfer the land to her husband David Mabembe Ibate on behalf of her deceased father-in-law James Mabembe Ibate. That she has been living on the land from time immemorial and both her husband and father-in-law are buried therein. That the respondent had concealed the fact that she had a beneficial interest in the land and omitted to issue her with citations. That the respondent knew or ought to have known that his deceased father had agreed to transfer the land parcel No. Mwerua/Kagio/18 to David Mabebe Ibate

That the land has already been registered under the respondent's name and he has filed **Embu HCCC No.890 of 2011** seeking to evict her from the land. She annexed a copy of the Green card for **Mwerua/Kagio/18** where David Mabembe Ibate's name was cancelled.

**Applicant's further affidavit**

She annexed agreement between the respondent's father and her husband whereby the respondent's father agreed to transfer the land to her husband. She also attached two affidavits of witnesses present during preparation and execution of the said agreement. In addition, she annexed summons for revocation of grant filed by her husband in respect of James Mabembe Ibate whereby the respondent had applied for grant.

## Respondent's case

In response, he stated that his father inherited the land lawfully and it was not true that he had agreed to transfer to the applicant's husband. He filed documents denying the fact that David Mabembe Ibate was a son of James Mabembe Ibate. He obtained the applicant's husband identification report together with that of his mother and siblings which indicated their father was Kehohia Gachanja. That the applicant's husband was a conman, a criminal and forger of documents.

He annexed identification reports and a sale agreement dated 23/07/1998 between David Mabembe Ibate and I. W Muchiri for the purchase of the suit land. That his father had filed succession cause No. 324/1993 at the Senior Resident Magistrate's Court Kerugoya which is the one the applicant should have challenged. That the challenge to the grant issued by the High Court is misconceived.

The court gave directions that the matter proceeds by way of viva voce Evidence. Parties adduced evidence. The applicant testified that the deceased Muthigani Kathitu Warui had a land dispute with her late husband David Ibate Mabembe concerning Land parcel No. Mwerua/Kagio/18. She relied on her witness statement dated 22/7/15. She further produced photographs as exhibits to show the developments she has made on the land. She relied on the agreement between her husband and Muthigani Kathitu and a copy of the green card for the land parcel.

The respondent adduced evidence and called witnesses. He testified that he filed the succession in cause in Nyeri and it was later transferred to this court. The deceased is his father. He filed Form P & A8 and did not write anything which was false.

He listed himself and his mother as beneficiaries in accordance with the wishes of his father. He testified that the applicant and David Ibate are not related to him. They therefore have no right to revoke the grant. No grant has been served on him relating to the estate of David Ibate Mabembe.

He testified that David Ibate Mabembe moved into the land Mwerua/Kagio/18 as a squatter in 1998. He wrote a letter to him to vacate but he caused his father to be arrested and arraigned in court with others. They were acquitted and the court ordered that David Ibate Mabembe be investigated on his personality. The court doubted his identity. That David Ibate Mabembe has been using different names. That the applicant has no colour of right to succeed the estate of the deceased.

The parties proceeded to file submissions. For the applicant it is submitted that the issue for determination is whether the grant was obtained fraudulently. It is submitted that the grant was obtained fraudulently as it was registered in the name of James Mabembe who is the father-in-law of the applicant. Muthigani Kathitu was not related to James Mabembe and he signed an agreement to transfer the land back to James Mabembe. That the grant be revoked and the applicant to file a fresh succession cause. He relies on Chuka High Court Succession Cause No. 26/2016 and Kakamega High court Succession Cause No. 12/2014.

For the respondent, it is submitted that the applicant's husband was an impostor, a fraudster and a law breaker whose sole motive is to disinherit the rightful beneficiaries to the estate of Muthigani Kathitu Warui of their bequest and the applicant being his wife is only propagating that crime. It is submitted that the deceased David Ibate Mabembe had used different names and tried to obtain identity card fraudulently. That the applicant has not come to this court in clean hands.

It is further submitted that the applicant has not established any of the grounds under Section 76 of the Law of Succession Act to warrant this court to order the revocation of the grant. That the applicant has overwhelmingly established that the grant was obtained lawfully. He prays that the application be dismissed.

I have considered the application, the evidence tendered and the submissions. Three issues arise for determination.

These are:-

- Locus Standi of the applicant Charity Wangui Munene.
- Whether David Ibate Mabembe is a beneficially entitled to the Estate of the deceased.
- Revocation of grant.

### Locus Standi of the applicant.

From the record, David Ibate Mabembe had filed a summons for revocation of grant dated 11/4/2007. He was seeking revocation of the same grant which was issued to Symon Nyamu Muthigani, the respondent. It seems the application was not heard and determined. The application has not been withdrawn. It therefore goes without saying that the applicant is pursuing the same orders which her husband was seeking. It is said that her deceased husband died during the pendency of the application.

For one to file a suit or to prosecute proceedings on behalf of a deceased person, that person is required to obtain either a Limited Grant or a Grant ad Litem or ad-Colligenda Bona. Section 54 of the Law of succession Act provides: -

**“A court may according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make in any of the forms described in the 5<sup>th</sup> Schedule.”**

The Act provides for various forms of Limited Grant or special grants. They include Limited Grant of Letters of Administration ad Litem, Limited Grant of Letters of administration ad Colligenda bona, Limited Grant of Letters of Administration Ad de bonis non, Limited Grant of Letters of Administration durante absentia and others which are to be found under Schedule -5- of the Act. The grants are Limited in

nature and are therefore to be used for the specific purpose for which they are issued.

A party filing a suit on behalf of another may file a full grant of representation which takes care of the administration of the entire estate of a deceased person. In Trouistik Union International Union & Another –v- Jane Mbeyu& Another, C.A 145/1990 the Court of Appeal composed of a bench of 5 Judges held:-

**“Accordingly to determine who is empowered to enforce that cause of action, for what purpose and when in point of time, one must look at the Act and allied relevant legislation. One such enactment is the Law of Succession Act (cap 160) Section 2 of the Act provides in mandatory terms that unless any other written law provides otherwise, the provisions of the Act shall constitute the Law in Kenya in respect of and shall have universal application to all cases of intestate succession or testamentary succession to the estate of deceased person dying after commencement of the Act.**

The applicant contends that the deceased had entered agreement to transfer land to her late husband in an agreement dated 24<sup>th</sup> July, 1998. The applicant was not a party to the said agreement. **Section 3 of the Law of Succession Act** provides that an administrator or an executor means a person to whom a Grant of Letters of Administration has been made in her favour. The law is clear that it is only the personal representative of the deceased who can bring and agitate by a suit any cause of action vested in the estate. The person who can legitimately bring an action on behalf of a deceased is the administrator of the estate of the deceased.

My view is that the applicant lacks legal capacity to file the suit on behalf of her deceased husband. The applicant has variously deponed in her affidavits that the deceased in this cause entered an agreement with her late husband David Ibate Mabembe. The agreement annexure CWMI was between Muthigani Kathitu and David Ibate Mabembe. The applicant was not a party and was not privy to that contract. The agreement formed the basis of the application for revocation which was filed by David Ibate Mabembe. For the applicant to legitimately proceed with the suit she ought to be a personal representative or an administrator of the estate of the deceased by obtaining letters of administration from the court to qualify as an administrator or personal representative. The Act provides for the powers of personal Representatives. **Section 82 (a) & (b) of the Law of Succession Act** provides:-

**a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate; (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:**

**Provided that**

**(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and**

**(ii) no immovable property shall be sold before confirmation of the grant;**

There are other powers but the above are relevant. I find that the applicant having not obtained a grant of Letters of Administration whether limited or a full grant lacks capacity to file the present application and the application is therefore not properly before this court. The application is therefore incompetent.

2 Whether David Ibate Mabembe is a beneficiary entitled to the Estate of the deceased – Muthigani Kathitu.

The applicant relies on agreement dated 24/09/1998 which states that the deceased transferred Land Parcel No. Mwerua/Kagio/18 to David Ibate Mabembe. The respondent denied knowledge of the said agreement. He denied that he signed it or that he was present. He denied that he signed the agreement. The applicant had the burden to prove that the respondent was aware of the agreement and that he signed it or was the one who recorded. He who alleges must prove. Section 107 of the Evidence Act provides: -

**“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**When a person is bound to prove the existence of any fact which he asserts, it is said that the burden of proof lies on that person.**

**108 incidence of burden:**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

There are many ways through which the applicant could prove that the respondent signed. He could have called a handwriting expert. Surprisingly none of the persons named in the agreement were positively identified by use of Identity card numbers. Neither the alleged transferor nor the transferee gave their identity card numbers. The typed agreement meant to be a follow up of the one dated 24/7/98 is dated 20/7/98. The respondent was not a party to the agreement entered. When PW-2- testified he stated that the agreement was written at the Police Station.

There were Criminal Proceedings in Kerugoya Principal Magistrate’s Court Criminal Case No. 1943/1998 where four person including the deceased Muthigani Kathitu were charged with conspiracy to defraud James Marembé Ibate(sic) of land parcel No. Mwerua/Kagio/18 and Plot No. 14 Kagio Market, false swearing, procuring execution of a false document and obtaining Land Registration by false pretences. David Mabembe was the complainant. They were charged on 15/9/98 though the charge sheet shows they were arrested on 14.7.1998. The

proceedings were produced in evidence by the respondent. David Ibate Mabembe testified on 11/5/2000. Surprisingly he never referred to the said agreement between him and the deceased which was entered in 1998. The Advocate who drafted the agreement Mr. Karani testified that the agreement was entered so that the deceased could transfer back the land and the complainant to withdraw the case. He said he was aware that the deceased was removed from the police cells to go and sign the agreement. He also said he was aware that the agreement was not effected. The agreement is dated 20<sup>th</sup> July, 1998.

It would seem that the deceased was coerced to sign the agreement on a promise that he would be released. It was not agreement which was entered freely as the deceased was removed from the Police Station with a promise that the case would be withdrawn. Justice Muongo in the case of **Benson Omwenga Ajyere-v- Kirati Nduto & Another 2013 eKLR** considered coercion, undue influence and frustration and considered the definition in Black Law Dictionary which defines coercion as **“compulsion constraint, compelling by force or arms or threat”**. He stated that –

**“it is to compel a person to do an act which is against his will or a situation where one person is under a State of subjection to another person so that he is constrained to do what his free will would refuse. It is also referred to as duress. Duress in contract relates to a situation where a person enters an agreement as a result of threats.”**

Undue influence is described in Black Law Dictionary as **“persuasion, pressure or influence short of actual force but stronger than mere advice that so over powers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts instead, subject to the will or purposes of the dominating party.”**

The respondent denied knowledge of the said agreement. The fact that the deceased signed the agreement after being hauled from the Police Station (He was arrested on 14/9/1998 on 24/09/1998 according to another charge sheet). He could not have entered the agreement freely. The agreement was never effected as the case was not withdrawn and the land was not transferred to the applicant’s husband. The agreement of 24.7.1998 which witnesses testified to is very suspect as there were contradictions as to where it was entered and the date.

My view is that the applicant has failed to discharge the burden to prove that the respondent was aware of the said agreement when he filed the succession cause. In the English Case of **Pao-on –v- Liu Yiu Long (1980) AC 614** where the Privy Council considered the question of commercial pressure the court held:

**In determining whether there was coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him as an adequate legal remedy, whether he was independently advised and whether after entering the contract he took steps to avoid at all these matters are ----- relevant in determining whether he acted voluntarily or not.”**

The respondent submits that the agreement was in furtherance of the applicant’s false allegations and the motive was to disinherit the rightful beneficiaries. The deceased avoided the contract as he did not transfer the land to the applicant’s husband. This leads to the conclusion that the deceased had no intention to transfer the land to the applicant’s husband after being coerced to enter the agreement.

The ruling by the trial Magistrate in the Criminal Case No. 1493/1998 stated **“that the complainant gave police a lot of false information and that it was a wonder that to date no action has been taken against him. That the complainant with all the controversies was yet to prove before any court that he was indeed the deceased’s son and entitled to inherit from him, before this is established it cannot be said they conspired to defraud.”** The court further stated that the PW-1- (David Ibate Mabembe) was all along disputed as a son of the deceased. It stated:

**“Infact it was disputed all along that PW-1- was even deceased’s son and with all the anomalies regarding his evidence and documents the police should have had him investigated establish exactly who he is. Infact with the evidence so far adduced, I would think that he is to be thoroughly investigated and charges regarding his personality brought against him.”**

The character and antecedent of the applicant’s husband show that he is somebody who was capable of forging documents and coercion and threats. The agreement relied on could not have been entered voluntarily. The applicant’s husband must have obtained the agreement as a short cut to acquiring what he was not rightfully entitled to. The respondent could not have known of such agreement and he stated as much.

The agreement, was not valid and could not have lawfully transferred an interest in land to David Ibate Mabembe. The agreement was over Agricultural Land and therefore fell under the provisions of the **Land Control Act Cap 302 Laws of Kenya** which provides under **Section -6-** provides that transactions affecting agricultural land are null and void for all purposes unless the Land Control Board for the Land Control area has given its consent in respect of that transaction in accordance with this Act. **Section 6 of the Land Control Act** provides:

**“Each of the following transactions-**

**“the sale transfer, lease mortgage, exchange, partition other disposal or dealings with any agricultural land which is situated within a Land Control area----- is void for all purposes unless the Land Control Board for the Land Control area in which the land is situated has given its consent in respect of that transaction in accordance with this Act”.**

**Section 4 of the Registration of Documents Act** provides:

**That a document purporting to confer or extinguish any right title or other interest in or over immovable property shall be registered.**

This agreement which the applicants relied on has surfaced very late in the day and is suspect and most unreliable. It has not complied with the law and cannot confer any interest to land.

It should not escape the attention of this court that soon after it was obtained, the applicants husband purported to sell the land in a sale agreement and to register himself as proprietor without following due process. The agreement was obtained with ulterior motives.

The agreement which David Ibate Mabembe entered with the deceased is null and void as no consent of the Land Control Board was obtained. It therefore cannot be relied upon by the applicant to claim that it conferred a beneficial interest on Land Parcel No. Mwerua/Kagio/18.

On the other hand, since the land had been registered in the name of the deceased at the time the said agreement was entered and the applicants' husband David Ibate Mabembe was not a beneficiary entitled to his estate, the only recourse was to move the court by way of a Civil Suit in the Environment and Land Court to recover the Land. This is because at the time the said agreement was entered, the land in dispute was registered in the name of the deceased Muthigani Gathitu. It formed his estate. Section 3(2) of the Law of Succession Act defines 'estate' as follows: ***"means the free property of a deceased person."***

***'Free property'*** is defined as follows in relation to a deceased person, means, ***"the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."***

The applicant's claim was based on contract to recover land and does therefore not fall under the disputes envisaged under the Law of Succession Act.

Section 2(1) provides:

***"Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of and shall have universal application for all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."***

The applicant's supporting affidavit at Para -4- states: -

***"The deceased herein who is also the father to the respondent agreed to transfer the aforesaid parcel of land to my husband James Mabembe Ibate on behalf of my deceased father-in-law James Mabembe Ibate (sic) in several meetings and the respondent was a witness."***

This forms the gist of the applicant's claim and it is one that does not fall under the law of succession Act.

The other issue as regards the applicant's husband is whether he is a son of James Mabembe. It is not in dispute that the deceased Muthigani Kathitu Warui was the closest relative of James Mabembe in the absence of other claimants of his estate. David Ibate Mabembe claims that he is the son of James Mabembe.

The ruling in the Criminal case which I have considered above doubted who David Ibate Mabembe really was and ordered an investigation to establish exactly who he is. There is nothing to prove that any investigations were done or whether police established who he is. There was no appeal against that ruling. It means the issue as to his personality was determined by a court which had competent jurisdiction to do so. The situation remains the same. David Ibate Mabembe has not taken steps to establish exactly who he is. He has come to this court despite the finding by the Criminal Court way back in 2001.

The evidence tendered by the applicant was contradictory. The applicant herself has used the names James Mabembe Ibate and David Mabembe interchangeably to mean her husband. This is at Para -4- of supporting affidavit and in court at Page -7- of typed proceedings where she states that my husband was James Mabembe. She then said her husband was also known as Kariuki and Ibate. This raises doubts on her testimony as she cannot differentiate between the father-in-law and her husband.

The ruling in the Criminal Court conclusively determined that it was in dispute that David Ibate Mabembe was the son of the deceased.

Section 43 & 44 of the Evidence Act provides:

**(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.**

**(2) Such judgment, order or decree is conclusive proof—**

**(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;**

**(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;**

**(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;**

**(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.**

That the finding of a court is conclusive proof of an issue which is in dispute in that court and other courts which maybe considering the issue. The criminal case was concluded by a ruling which acquitted the accused persons under **Section 210 of the Criminal Procedure Code.**

In addition to that the said David Ibate Mabembe had multiplicity of names which he was using inter-changeably to refer to himself for reasons only known to himself. In the proceedings before the criminal court, a certificate of previous convictions were produced in the proceedings which were produced in this court. David Ibate Mabembe was as submitted by the respondent a perennial jail bird who had been jailed for theft, robbery with violence and burglary. On 30/11/78 he was convicted under the name Kariuki Kihohia.

On 25/4/79 he was convicted under name Kariuki Kihohia. 22/3/84 he was convicted under name David Kariuki Mabembe. On 22/8/91 he was convicted under Kivate Warui and on 17/2/99 David Kariuki Mbembe. It would seem he used a different name everytime he was convicted. The question asked by the trial Magistrate in the Criminal case remains unanswered to date – who exactly is he.

Even with regard to the identity card, it does not help. The Identity card Number – 24203903 annexed by the applicant for David Ibate Mabembe, upon inquiry, it was found that it was a replacement for a lost/stolen identity card.

David Ibate Mabembe's mother is indicated as Tabitha Gachui and father James Ibate Mabembe. The date of birth of David Ibate Mabembe is shown as 1959. He swore an affidavit that he was born in 1962 and that he had not taken registration since birth. The affidavit was sworn on 5/6/1998.

However, the document shows that the registration was rejected by the Registrar of Persons with remarks that application card was altered and he requested for birth certificate of David Ibate Mabembe and his parent's identity card. He therefore hit a snag to obtain a identity card as a none registered person.

David Ibate then tried to get a duplicate Identity Card on 28/8/98 and gave his lost Identity Card as Number 21553067. This number was found to belong to Jesca Chepngeno Bett of Ndanai Division of Bomet District in the Rift Valley Province. The Identity Card Number in the name David Ibate Mabembe was issued on 27/6/07 and it has been proved that the number 2155067 belonged to somebody else. There is no doubt that David Ibate Mabembe went out of his way by hook or crook to obtain an Identity Card in the name of Mabembe in order to make a claim that he was a son of James Mabembe which he was not. This proved by the report on the Identification of his mother Tabitha Gichui Kihohia, his Sister Peninah Kihohia Gachanja alias Kihohia Gachanja and Step-brother Abraham Mwangi Kihohia. David Ibate Kihohia had been convicted by name Kariuki Kihohia and Kihohia Karanja. The mother, Sisters, father and David were not known with surname Ibate or Mabembe. It is David Ibate Mabembe who in 1998 tried to get registered as the son of James Mabembe but failed after the Registrar discovered the fraud in changing (altering) the names on the card and that David Ibate Mabembe was attempting a double registration. It is clear from the documents that the attempt by David Ibate Mabembe to be registered under that name was a forgery and firstly it is not prove that he is the son of Mabembe, secondly his identity remains in dispute. The evidence is in the documents produced by the respondent in the list of documents from No. 7-18. The applicant's husband in his usual character of a habitual criminal tried by all means to forge an Identity card to show he is a son of James Mabembe in order to acquire his estate unlawfully. A habitual thief, robber and burglar tried to graduate to steal land. The criminal case No. 408/1999 is testimony to this.

This was however nabbed in the bud as the forgeries were detected by the Registrar. I find that the applicant has not proved that David Ibate Mabembe which is not his name anyway was a son of Mabembe. He is not entitled to the estate of the deceased James Mabembe. **Section 29 of the Law of Succession Act** provides:-

**“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

**(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

My finding is that David Mabembe is not a son of James Mabembe and is therefore not a dependant entitled to the estate of James Mabembe.

The applicant has submitted that they have lived on the land and developed it. The respondent filed a letter dated 28/6/1999 which states that the Kariuki Kihoria Alias David Ibate invaded land parcel No. Mwerua/Kagio/18 early in the year 1998 and was ordered to vacate. He has also filed suit seeking to evict the applicant. The applicant has had notice to vacate the land. The fact that the applicant has developed the land is not sufficient to deny the registered proprietor of the land of his rights to use and occupy land.

### 3. revocation of Grant.

**Section 76 (a), (b) & (c) of the Law of Succession provides: -**

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-**

**(a) that the proceedings to obtain the grant were defective in substance;**

**(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;”**

The section lays down the grounds which a party seeking revocation of grant is supposed to establish. A party need not prove all the grounds; it is sufficient if a party establishes any of the grounds under the section. Rule 44 of the Probate and Administration Rules provides for the procedure to be followed in filing the application.

The applicant seeks revocation/annulment of grant on the grounds that it was obtained fraudulently by make of a false statement, making untrue allegations of fact essential on a point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently and concealment of court of something material.

The applicant has not proved that the grant was obtained fraudulently. The party who alleges fraud must prove the particulars of fraud as fraud is serious allegation. No particulars of fraud were pleaded in the affidavit.

The respondent has demonstrated that he followed the procedures laid down in the Law of Succession Act by obtaining a Chief's letter, the cause was gazette and the grant was issued by the court as there was no objection filed within the period stipulated in the Act for filing objections and protests.

On the allegation of making false statements, concealment and making of false allegations. I note that there were two grants which had been issued. The first grant was issued in Succession Cause No. 324/1993 in the Estate of James Mabembe and was issued to Muthigani Kathitu Warui(deceased in this cause). The grant remains intact as the applicant is not seeking to revoke that grant.

The deceased Muthigani Kathitu Warui was registered as the proprietor of the said land parcel, that is Mwerua/Kagio/18. The respondent obtained in a grant in this cause. He is the son of Muthigani Kathitu Warui (deceased). This was the second grant and is the one the applicant seeks to annual. Revocation of the 2<sup>nd</sup> grant would leave the 1<sup>st</sup> grant still in place.

My view is that the applicant ought to have moved the court to revoke the two grants as revoking the 2<sup>nd</sup> grant would not achieve anything for the applicant.

The grant issued to the respondent was issued procedurally in court and no material facts were concealed from court. He is the son of the deceased and therefore a dependant as provided under Section 29 of the Law of Succession Act which I have quoted above.

The applicant failed to prove that the respondent had knowledge that the deceased had agreed to transfer the land to the applicant's husband. I have given reasons above as to why the agreement which the applicant produced cannot be relied on. The respondent has proved that he had no knowledge of the said agreement.

He has also proved that David Ibate Mabembe through whom the applicant claims is not a dependant of the original owner of the land but a person who went out of his way using criminal means of forgery to obtain identity cards to falsely indicate he is a son of James Mabembe. These documents were laid before this court by the respondent as analysed above.

There is no credible evidence laid before this court to prove that David Ibate Mabembe had a claim over the estate of the deceased or the estates of James Mabembe.

I find that the applicant has failed to prove any of the grounds under

Section 76 of the Act cited above to warrant this court to revoke the grant.

I order that:

- a. The application is in – competent and is not properly before this court as the applicant has no locus standi to bring the application.
- b. David Ibate Mabembe is not a dependant of the deceased.
- c. The application for revocation of grant is without merits and is dismissed with costs to the respondent.

**Dated at Kerugoya this 18<sup>th</sup> day of October, 2019.**

**L. W. GITARI**

JUDGE